NO. 2592

United States

Circuit Court of Appeals

For the Ninth Circuit

BEN GUIDONI,

Appellant,

vs.

J. H. WHEELER, City Jailer of the Town of Juneau, Alaska,

Appellee.

Brief for Appellant

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1

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BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal under Section 1440, Compiled Laws of Alaska, from an order discharging a writ of habeas corpus and remanding the plaintiff (appellant) to the custody of defendant.

Plaintiff was arrested under a complaint charging vagrancy in violation of an ordinance of the town of Juneau, Alaska, and was prosecuted before the municipal magistrate of that town. He was in that proceeding convicted and sentenced to pay a fine of $100, in default of which he was incarcerated for a term of fifty days. A writ of habeas corpus was sued out before the District Court and after a trial the writ was discharged and the prisoner remanded to the custody of the said jailer.

Plaintiff contends that the imprisonment is unlawful, because:

1—The municipal magistrate is vested with no judicial functions, has no authority to hear and determine causes or to order imprisonments; in brief, that the magistrate's court of the town of Juneau has no legal existence.

2—The ordinance under which the prosecution was had is void for the reason that the town had no authority to declare the acts therein denounced a crime.

The complaint charges that the vagrancy consisted in this, that defendant did "reside within the corporate limits of the city of Juneau, with no visible means of living or lawful occupation or employment with which to earn a living, and that during said period the said defendant did wander about the streets of Juneau after the hour of eleven o'clock P. M., without a lawful occupation or business."

The ordinance denounces other acts besides those recited in the complaint, but here we deal only with those acts for which appellant is incarcerated.

Appellant contends that the City Council has no authority to declare such acts criminal, for the following reasons:

(1) The town has no express authority to penalize vagrancy, and where, as in Alaska, the general Penal Code defines vagrancy and declares it a crime for the entire Territory, both within and without the limits of municipalities, no concurrent jurisdiction on the part of the municipality can be implied.

(2) The general welfare clause of the municipal charter does not confer concurrent authority over crimes denounced by the Code. Clear *express* authority is essential in such cases.

(3) In addition to the general welfare clause of the municipal charter that document enumerates

certain specific instances where the common council may legislate on subjects already covered by the Penal Code. This enumeration must be held exclusive under the doctrine of *expressio unius est exclusio alterius.*

(4) Under the general welfare clause, the municipality can denounce only such acts as are nuisances *per se.*

(5) Even if the ordinance were, in its general scope, within the power of the city to enact, it is void as unreasonable, oppressive and inequitable:

(a) The declaration in the ordinance that "all persons living within the corporate limits of the city of Juneau, who have no visible means of living or lawful occupation or employment by which to earn a living * * * *shall be deemed vagrants," attempts to denounce that as a crime which is not a nuisance *per se,*—nor even morally wrong, but at most only a misfortune.

(b) The other declaration of the ordinance that "all persons, having no known occupation or business, who shall be found wandering about the streets of the city of Juneau after the hour of eleven o'clock at night, shall be deemed vagrants," is void for the reason that a man without a job has just as good rights to wander upon the streets as a man with a job, and, moreover, the crime consists in being found wandering and not in wandering.

ARGUMENT

I.

THE MAGISTRATE'S COURT HAS NO LEGAL STATUS.

All the laws relating to municipal corporations in Alaska are contained in 33 Stat. L. Ch. 1778.

The only references in this codification to the alleged municipal magistrate's court are as follows:

Section 627 of the Compiled Laws of Alaska provides:

> "That the common council shall have and exercise the following powers: * * * Second, to appoint * * * a municipal magistrate."

Sub-section 10 of the same section provides:

> "The municipal magistrate shall have jurisdiction of all cases for violations of municipal ordinances and appeals shall lie from his judgments to the District Court in the same manner as appeals from the judgments of ex officio justices of the peace."

These provisions do not create a judicial tribunal. To create a court of justice it is necessary to do more than to give the thing a name. Three things are indispensable, (1) to define the jurisdiction; (2) to prescribe the manner in which jurisdiction may be acquired over the person; (3) to define the manner in which that jurisdiction is to be exercised.

From the above quotations it can only be infer-

entially assumed that the magistrate shall have authority to hear evidence pro and con and render judgment of guilt or innocence. But not even inferentially can it be determined whether it is necessary to file charges against the defendant, either written or oral, whether he may be personally present in court, whether he may be held on a warrant issued by the magistrate, whether the warrant issued must be supported by a verified complaint, whether the magistrate may issue subpoenas or compel otherwise the attendance of witnesses, whether he has authority to administer oaths, whether he may issue commitments, or do any of the many other acts proper, if not indispensable, to the proper administration of justice.

The council has been given no authority to enact rules for the alleged magistrate's court, nor has the magistrate himself been given such authority.

Nor is there anything in the name "magistrate" to indicate that he is a judicial officer. The term is applied generally to administrative officers, from the mayor of a town to the president of the United States.

The question was so carefully discussed in a parallel case which arose in Colorado, that it is deemed sufficient here to simply refer this court to that decision:

Ex rel Curley, 5 Colo., 412.

If, by way of illustration, it is supposed that the legislature enacted a law providing that Juneau

shall be a municipality, with municipal jurisdiction within its boundaries, could it be presumed that this would create anything or confer any power

Even if the law went farther and provided that there should be a common council with legislative power, and a mayor with executive power, would not those be equally futile?

Not only have pubic officers only such power as is conferred upon them, but they can execute that power only in the manner provided by law.

It will of course be admitted that in order to constitute a judicial tribunal under the fifth amendment to the Constitution, it is indispensable that both parties to an action, whether civil or criminal, be given an opportunity to be heard. But this is not all. It is indispensable that the law creating a tribunal provide for the manner and method of hailing both parties before it. The sixth amendment to the Constitution gives the defendant in a criminal case the right "to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor". The Act here in question does not provide the means whereby any of these provisions may be complied with.

It is answered that the alleged magistrate has the authority to improvise those means. Such power is admittedly not expressed, and it cannot be implied.

"Where a judgment is void without notice,

and the law under which the proceeding is had requires no notice, such notice can not be implied."

Stewart vs. Palmer, 30 Am. Rep., 290.

There is a striking analogy between municipal tribunals and a board authorized to assess and levy taxes. Both are judicial tribunals with jurisdiction confined to special subjects. The principle involved in the case at bar has frequently been passed upon involving the proceedings before tax commissioners.

It is well settled that tax laws which provide no notice to taxpayers, giving them opportunity to be heard, are void, and such notice and opportunity cannot be supplied by the assessor in the absence of provisions for them in the statute itself.

Stewart vs. Palmer, supra.;

Railroad Tax Cases, 13 Fed., 722 (750);

Kuntz vs. Sumption, 2 L. R. A., 655;

Campbell vs. Dwiggins, 83 Ind., 473;

Jackson vs. State, 104 Ind., 516;

Garvin vs. Daussman, 16 N. E. 826.

"It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such law, that the assessment has in fact been fairly apportioned. The constitutional validity of the law is to be tested not by what

has been done under it, but by what may by its authority be done. The legislature may prescribe the kind of notice and the method in which it shall be given, but it cannot dispense with all notice."

Stewart vs. Palmer, supra.

"The statute does not provide for notice to taxpayers whose taxes it is proposed to increase, and this infirmity destroys it. It is not enough that in fact the taxpayer does have some notice or information, for the law must provide for notice, or else no legal notice can be given. A man may be subpoenaed as a witness in an action pending against him, but unless he is summoned or notified as a party under some law authorizing a summons or a notice, the proceedings are utterly void. A man may be served with a written notice that a petition for a ditch is pending, but if there is no law authorizing the notice, it will be unavailing. A notice not authorized by law is in legal contemplation no notice."

Kuntz vs. Sumption, supra.

"It is without doubt essential to the validity of every law under which proceedings may be had for the taking of property, or to impose a burden upon it which may result in taking it, that the law make provision for giving some kind of notice at some stage of the proceeding."

Garvin vs. Daussman, supra.

It is also well settled that in proceedings to con-

demn property under the power of eminent domain, the same rule holds good. Not only is notice required, but the law authorizing the proceeding must prescribe the manner of giving notice and the manner of affording a hearing to the property owner.

Lewis on Eminent Domain, Par. 368.

By virtue of this principle, the Act giving the municipal magistrate jurisdiction over violations of municipal ordinances, is void because it fails to prescribe the manner in which the jurisdiction is to be exercised, fails to provide the means for hailing defendants into court, and fails to provide for a hearing.

II.

Congressional Enactment Conferring Powers on Towns.

A.

Original Enactments.

The town of Juneau is organized under the general laws of Congress relating to Alaska.

The first legislation on the subject is found in Ch. 21 of Title V. of Act of June 6, 1900, (Carter's Code, pp. 393-4.)

Sec. 201, p. 394, Carter's Code, defines the powers of the common council. This law did not authorize the town to penalize any act prohibited by the coun-

cil. In the absence of express authority to do so, the power to enact penal ordinance does not exist.

City of Owensboro vs. Sparks, 36 S. W., 4.

This defect was attempted to be remedied by the Act of March 2, 1903, (32 Stat. L., Ch. 978, p. 944.)

Section 3 of that act defines the powers of the common council.

Sub-section 5 authorizes the council "by ordinance to declare what shall be a misdemeanor."

Sub-section 11 empowers the council "by ordinance to provide reasonable punishment for the violation of municipal ordinance, by fine or imprisonment or both."

The lower court held that this gave the town a jurisdiction concurrent with Congress and authorized it to declare not only all those acts misdemeanors which were so under the general Penal Code, but to declare any other act a crime which the council at their pleasure, should see fit to penalize.

If this be so, the town can legislate on anything from murder to assault, from forgery to petty larceny,—the whole field of criminal jurisprudence.

But this interpretation will not stand the test either of reason or authority.

My contention is that this clause of the law of 1903 was intended only to cure the defect in the law of 1900, and to give the council authority to penalize those acts over which the town had been, by other provisions, either expressly or by necessary implication, given jurisdiction.

B.

Repeal of Law of 1903.

In 1904, Congress passed an Act entitled: "An Act to amend and codify the laws relating to municipal corporations in the District of Alaska."

33 Stat. L., Ch. 1778, p. 529.

This law appears as Ch. 21, of Compiled Laws of Alaska, (pp. 315 to 322).

This act was expressly and obviously intended as a codification and amendment of previous legislation on the subject.

It covers all features of municipal government attempted to be covered by previous enactments as well as some new features.

The court below held, however, that this law does not repeal the law of 1903. I maintain that it does.

Inasmuch as the lower court also contended that the validity of the ordinance here in question rests upon the powers granted by the law of 1903, but not embodied in the subsequent legislation, this point is a crucial question in this case.

Section 4 of the last act provides: "That the said common council shall have and exercise the following powers," and then proceeds to enumerate *sereatim* what those powers shall be. In this enumeration recur most of the powers conferred by the law of 1903, together with many new and additional powers, but the clause "to declare what shall be a misdemeanor" has been omitted.

The court below contends that, by omitting to enumerate some powers in the new section defining the powers of the council, Congress meant to indicate that it wished to retain them in force as originally enacted in 1903. This might find support in reason if the new section had omitted all the powers of the old law and enumerated only the new powers intended to be conferred; but when the majority of the old powers were included in the new enumeration, it seems obvious that the new law was intended to be exclusive and to embrace all of the powers which Congress intended to confer. In other words, that the new law is a codification and amendment in fact, as the title declares and as the opening paragraph of Section 4 indicates.

This doctrine is in conformity with both reason and authority:

> "But the general rule seems to be that statutes and parts of statutes omitted from a revision are to be considered as annulled and are not to be revived by construction."
>
> *Endlich on the Interpretation of Statutes*, Sec. 203, pp. 271-2;
>
> *Brocken* vs. *Smith*, 39 N. J. Eq., 169;
>
> *Ellis* vs. *Paige*, 1 Pick. (Mass.), 43-5;
>
> *Rutland* vs. *Mendon*, Id., 54.
>
> "Where a statute is evidently intended to revise the whole subject treated in a former statute and to be substituted therefor, it repeals such former statute."

Sedgwick on Construction of Statutes and Constitutional Law, p. 365.

"Where one act is framed from another, some parts taken and others omitted, the later act operates without any repealing clause as a repeal of the first."

Sutherland on Stat. Const., p. 209.

"Sections omitted in a revision are not revived but annulled."

Pingree vs. *Snell*, 42 Me., 53.

"It is a well settled rule, that when any statute is revised, or one act framed from another, *some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled.* To hold otherwise would be to impute to the legislature gross carelessness or ignorance, which is altogether inadmissible. We are not therefore at liberty to suppose that the proviso or exception in the provincial statute was omitted by mistake."

Ellis vs. *Paige*, 1 Pick, (Mass.), 45.

As was said by the Supreme Court of Chancery of New Jersey, in *Bracken vs. Smith*, 39 N. J. Eq., 171, relating to a similar condition, and referring to the later act revising a former act on the same subject:

"By the passage of that act, the legislature intended, as I think, to gather up and incorporate in a single act all the prior legislation that they thought worth preserving, and to sweep

the rest away. The legal rule which must control the decision of the case is perfectly well settled. **** Where two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. *United States vs Tynen*, 11 Wall., 88. Mr. Justice Van Syckle, in *Roche vs. Jersey City*, 11 Vr. 257, 259, said: 'This rule does not rest strictly upon the ground of repeal by implication, *but upon the principle that when the legislature makes a revision of a particular statute and frames a new statute upon the subject-matter, and from the frame-work of the act it is apparent that the legislature designed a complete scheme for the matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded.* It is decisive evidence of an intention to prescribe the provisions mentioned in the later act as the only ones on that subject which shall be obligatory.

"It is sound law, we think, and no authorities can be found that will controvert it, that a subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, must operate to repeal the former, although it contains no words to that effect."

The case of *Ripley vs. Gifford*, 11 Iowa, 367, is in point. There the legislature omitted in revising the Code to provide a "fee bill" to guide in the charging of fees by municipal officers. It was contended that because of such omission, the old fee bill was in force and should be followed, but in denying such contention the Supreme Court of Iowa uses the following pertinent language:

> "The rule that the real intention of the legislature, when ascertained, will prevail over the literal sense has no application. The legislative act unmistakably fails to provide for the compensation of these officers. There is no obscurity; nothing left in doubt. There is no language that we are called upon to construe. It is simply a *casus omissus*, and we can not presume because the general assembly ought to have provided a 'fee bill', that they would, therefore, have re-enacted the old one, any more than we can presume they would have enacted another and different one. To say that chapter 136 is still in force, would be most palpable judicial legislation. *The legislative will is frequently as clearly shown by omission to legislate upon a given subject, as by the use of language the most positive and explicit.* It is our duty to declare the law, that of the legislature to make it. Our province is not by interpretation and construction to supply an omission, any more than it is to declare the law otherwise than we find

it, when the language used is clear, explicit and positive. The duty of courts in this respect is too well and uniformly settled to permit a departure from it, however great the necessity or pressing the exigency.

"The consequences to result from this view have been strongly urged by those claiming that the legislature intended to re-enact the old law. With these consequences we have nothing to do, in a case so free from doubt and uncertainty."

This is not a new question in this jurisdiction. Shortly after the enactment of the codification of 1904, Judge Moore, of the Second Judicial Division of Alaska, in the *Town of Nome vs. Schneider*, 3 Alaska Report, 60, held that the powers conferred on the town by the law of 1903 were absolutely superseded by the codification.

In that case it was decided that the authority to impose license taxes, conferred by the law of 1903, must be deemed repealed by the law of 1904, by reason of the fact that such authority was excluded from the codification.

This court considered the same subject in *Freeding vs. Allen*, 173, Federal, 263.

While Judge Moore held that the law of 1904 abrogated all former powers held by the town council not re-enacted by the law of 1904, he yet maintained that the authority of the District Court to apportion license funds (collected from Federal licenses) be-

tween the school board and the common council pursuant to the law of 1903, was not abrogated by the codification of the subsequent year, but upon appeal this court held that the codification was such a complete revision of the whole system of municipal government, that even the authority bestowed on the court by the older acts was deemed revoked.

From the time Judge Moore, more than ten years ago, held that powers conferred on the town by the act of 1903, were revoked by the condification, no municipality has ever questioned the correctness of that ruling.

In conformity with this view, the compilation of the laws of Alaska, authorized by Congress in 1913, omits any reference to the law of 1903. So does the compiler of Federal Statutes Annotated.

The ordinance here under discussion was enacted in July, 1903. Even if it were valid under the law then existing, it became void when the power upon which it rests was revoked.

28 Cyc. 273-4.

Southport vs. Ogden, 23 Conn., 127.

III.

AUTHORITY UNDER LAW OF 1904.

A.

General Powers.

The question, then, is whether or not the law of 1904 authorizes the town to penalize vagrancy, assuming, *arguendo*, that any of the acts charged constitute vagrancy.

Sub-section 10 of section 4 of Act of 1904, authorizes the council "to prohibit drunkenness, gambling, houses or places of ill-fame, disorderly conduct or conduct endangering the public peace, public health or public safety; to define such offenses and prescribe the punishment therefor."

Sub-section 13 confers authority "to take such action by ordinance, resolution, or otherwise, as may be necessary to protect and preserve the lives, the health, the safety and the well-being of the people in the town, and to publish all ordinances."

Aside from the express power to punish "drunkenness," "gambling" and "houses or places of ill-fame", there is no authority granted in these provisions, except such power as is conferred by what is usually termed the "general welfare clause" of city or town charters.

Such general power to protect the health of the community and preserve the peace of the town gives authority only to inhibit such acts as are public nuisances in themselves.

The authority to protect health and life does not authorize any town to provide for boiler inspection, on the theory that in the absence of such inspection dangerous explosions may occur.

State vs. Robertson, 40 Am. St. R. 275.

Nor does the general welfare clause authorize a town to penalize assault and battery except when committed in a public place.

State vs. Brinkhauser, 3 N. W. 695.

Nor does the general welfare clause authorize the town to penalize private lewdness.

State vs. Hammond, 41 N. W. 243.

Nor the use of profane language in a private place.

State vs. Horne, 20 S. E. 443.

Nor to provide closing hours or closing days for stores or shops.

Cornwallis vs. Carlisle, 10 Org. 139 (143).

Watson vs. Thompson, 94 Am. St. R. 139.

State vs. Ray, 42 S. E. 960.

Nor to prohibit smoking of tobacco.

City of Zion vs. Behrends, 104 N. E. 836.

Nor does express authority to define nuisances, authorize that to be declared a nuisance, which is not so *per se*.

Village vs. Poyer, 5 Am. St. R. 524.

B.

No Concurrent Jurisdiction Implied.

In order to sustain the authority of the town to inhibit vagrancy, this court must hold that, under these *general* powers, the town has an implied authority to penalize those acts which are already denounced by Congress in the Penal Code.

Section 2031, Compiled Laws of Alaska, defines vagrancy and prescribes the punishment.

Congress in this section provides "That all *idle* or *dissolute* persons who have no visible means of living, or lawful occupation or employment by which to earn a living ***** shall be deemed vagrants."

The town of Juneau re-enacted this statute but struck out the words "idle" and "dissolute" and then inflicted the same punishment upon anybody who should be without a job, whether he was an idler or not.

The general doctrine is that the courts will not hold that the municipality has any authority to denounce an act as a crime which has already been so denounced by the state legislature, unless such concurrent authority is specifically conferred in *express* and unequivocal language.

A municipality has no other power than such as is expressly granted, and such other power as is necessary (not only convenient but necessary) to the powers expressly granted.

Where there is a doubt, that doubt must be resolved against a municipality.

The court will not infer the grant of a power which has already been and is exercised by the sovereign.

Where Congress has fully legislated on a subject, there can be no presumption from general grants that it intends to give concurrent jurisdiction over the same subject to the municipality.

City of Cornwallis vs. Carlisle, 10 Ore., 139;
In re Sic, 14 Pac., 405;
Ex parte Smith, Fed. Cas. No. 12, 967 a;
Thrower vs. City of Attica, 52 S. E., 76;
Moran vs. City of Atlanta, 30 S. E., 298;
Ex parte Wickson, 47 S. E., 643;
Judy vs. Lashly, 41 S. E., 197;
State vs. Godfrey, 46 S. E., 185;
State vs. McCoy, 21 S. E., 690;
In re Baxter, 12 R. I., 13;
Ex parte Bourgeois, 60 Miss., 663;
45 Am. St. R., 420;
Southport vs. Ogden, 23 Conn., 127;
Loeb vs. City of Attica, 82 Ind., 173;
42 Am. Rep., 494;
City of Owensboro vs. Sparks, 36 S. W., 4;
State vs. Welch, 36 Conn., 215;
Jefferson City vs. Courtmid, 9 Mo., 692;
Kansas City vs. Neal, 49 Mo. App., 72;
Town vs. Hammond, 76 N. C., 33;
State vs. Keith, 94 N. C., 933; .

Kassell vs. City, 35 S. E., 147;
State vs. Brinkhauser, 3 N. W., 695;
People vs. Brown, 2 Utah, 462.

A few expressions from the courts on this subject are here submitted:

"We are confronted with the broader question whether the ordinance was invalid, in that it undertook to make penal that which was already prohibited by the state law * * * and the familiar principle that a municipality may not prohibit by ordinance that which is already made penal by state statutes, unless there is express and specific legislative authority for the same, will apply."

Thrower vs. City of Atlanta, supra.

"According to the repeated adjudications of this court, a municipal corporation can not, in the absence of express legislative authority to do so, enact a valid ordinance for the punishment of an act which constitutes an offense under a penal statute of the state."

Moran vs. City of Atlanta, supra.

"Relator seeks his discharge because the city has no authority to pass an ordinance covering the same acts denounced by the penal code. We are of the opinion that the position is correct."

Ex parte Wickson, supra.

"The legislature has empowered municipal corporations of this state to preserve peace and good order therein, but the carrying of weap-

ons, although having a remote tendency to a breach of the peace, is much more objectionable on the ground of its danger to life and limb of the citizens *of the state.* It is probably on that account, more than any other, that it is made a statutory offense in nearly all of the states of the Union * * * *. It would be just as reasonable to say that that power extends to the punishment of petty larceny and arson under the power given to protect the property of citizens."

Judy vs. Lashly, supra.

"The state law fully covers and includes gaming and gaming devices so far as the legislature deems it expedient to legislate upon the subject. The city can, therefore, not legislate on the same subject without express authority."

State vs. Godfrey, supra.

The Supreme Court of Oregon, in a well considered decision, held that the general welfare clause does not authorize a city to enact ordinances enjoining the closing of stores on Sunday, *that act being forbidden by general law.*

City of Cornwallis vs. Carlisle, supra.

Supreme Court of North Carolina held that where gambling was made a crime by general law, a city ordinance covering the same subject is void.

State vs. McCoy, supra.

Supreme Court of Rhode Island has held that an ordinance prohibiting the opening of shops, etc., on Sunday is void, because inconsistent with the Sun-

day laws of the State which prohibit the same thing.

In re Baxter, supra.

"The general welfare clause does not warrant the punishment by the city of an offense which is a crime against the state.

"The power of the municipality to inflict a double or additional punishment to that inflicted by the state must be clearly expressed. It cannot be inferred from a mere general authority to legislate for the good government of the municipality."

Ex parte vs. Bourgeois, supra.

Under the general welfare clause a city can not by ordinance impose a fine for assault committed within the city, because the general law makes such an act a crime.

Ex parte Smith, Fed. Cas. No. 12, 967-A .

The Supreme Court of California has held, in two careful opinions, that an ordinance of a municipality, covering the same subject as a State law, must be held in conflict with the latter and not authorized.

In re Sic., 14 Pac. 405.

"A by-law of a borough, prohibiting the taking of oysters from the waters within said borough, during a certain period of the year, under a penalty therein prescribed, which the borough is authorized to make by its charter, is abrogated by the general law of the state, passed subsequent to the granting of the charter, prohibiting the doing of the same acts, under

a penalty, prescribed in the latter act, so far as such by-law prohibits such acts, whether such by-law was made before or after the passing of the general law; therefore, no action for the doing of such acts, after the passing of such general law, can be maintained on such by-law."

Syllabus in Southport vs. Ogden, supra.

Supreme Court of Indiana held that, under the general welfare clause, a city may not prohibit the sale of liquor on Sunday, when the legislature has prohibited such sale generally.

Loeb vs. Ciyt of Attica, supra.

C.

Enumeration of Special Powers Exclude General Powers.

It will be observed that the law of 1904 expressly enumerates specific subjects upon which the town is authorized to legislate. These are "drunkenness, gambling, and houses or places of ill-fame". All these are fully dealt with by the Penal Code.

Sections 2032, 2007 and 2571, Compiled Laws of Alaska.

When Congress singled out these three subjects over which to bestow concurrent jurisdiction upon the towns, the law wlil not infer by implication such concurrent jurisdiction over other subjects.

Why enumerate some if the same power was intended to apply to all?

28 Cyc., 274.

IV.

UNREASONABLENESS AND PARTIALITY OF ORDINANCE.

Assuming the City Council had authority to enact an ordinance denouncing vagrancy, the one here before the court is so unreasonable, partial and oppressive as to be void.

The acts denounced by this ordinance as vagrancy, so far as the charges against appellant are concerned, are two: (a) To be without employment; and (b) to "be found" wandering about the streets after eleven o'clock at night.

The validity of each of these features will be considered separately:

A.

The Crime of Poverty.

In charging appellant with being without "visible means of living or a lawful occupation or employment with which to earn a living", he has not been accused of any moral delinquency, nor with anything which is in itself a public or private nuisance. At most he is charged with being unfortunate. There can be no implied authority to denounce such condition as a crime.

Congress, in denouncing vagrancy, described the offender as an "*idle* or *dissolute* person without visible means of support".

Now, "idle" in such connection is defined as: "given to rest and ease; averse to labor or employment; lazy; as, an idle man, an idle fellow". (Webster).

It is evident the town council took the Federal law on vagrancy as a pattern, but eliminates the words "idle" and "dissolute", and thus attempted to render convictions so much the easier by placing all men without employment under the ban of the ordinance whether they were guilty of any moral wrong or not.

Ordinance Amended by Construction.

The lower court admitted that this definition of vagrancy is not sufficient as an enumeration of the various elements of a crime, but insists that it is the duty of the court to amend it by reading certain words and phrases into it which the town council had deliberately omitted.

The amendment proposed and actually adopted by the lower court and set out in his opinion (Pg. 27) is as follows:

> "Whoever is without means of support or lawful occupation or employment by means of which support can be obtained, and who conducts himself in such a manner as to be a detriment to the peace and order, or offend the sense of decency, or shock the morals of the community, is a vagrant."

Having amended the ordinance thusly, it would seem equally necessary to amend the complaint in the same manner. For this amendment enumerates

several additional elements of the offense found neither in the ordinance nor in the complaint.

But no authority can be found to support such extraordinary performances.

Had the code or the ordinance merely denounced vagrancy without at the same time defining what they mean by the term, then it would have been necessary to flounder about in the common law, as did the lower court, in search of the proper interpretation to be applied.

But to seek extraneous sources for that interpretation when the legislative enactments themselves avowedly undertook to and did supply it, is an unreasonable and uncalled for exercise of judicial authority. In fact, for a court to deliberately brush aside the definition given by the legislative power in explanation of its own enactments, and to supply another and different definition, would seem to merit earnest condemnation.

Where the legislature has carefully enumerated the elements which it declares shall constitute the crime denounced, it is not for the courts to add to or take from these elements.

Section 2031 C. L. of A., states what the elements of the crime of vagrancy are for this Territory.

The ordinance does the same for the city.

The learned court below admits that to prove only those acts which are enumerated in the complaint would not be sufficient to convict appellant of any crime. That should end this argument. But

the court insists that under his reformed definition a thousand and one things may be proven which are not referred to either in the ordinance or the complaint. That is the vice of this new doctrine.

The defendant is thus admittedly called upon to meet a thousand and one things which have not been charged against him and which have not been referred to as possible elements of the offense, though, had the legislature wished to do so, they might have made them such elements by expressly so declaring.

Nor is the definition supplied by the lower court the common law definition of vagrancy, as the court admits.

The learned court below asserts that the definition of vagrancy used by the town of Juneau is the one employed "time out of mind". That is *literally* true, but during the last hundred years no such definition of the offense has been employed by any legislature that undertook to denounce the crime of vagrancy.

The definition referred to by the court as having been used "time out of mind" originated during the days of Charles II. and the Bloody Circuit. At that time that definition enumerated all the elements of the crime.

It was sufficient in those days, in order to convict a defendant of vagrancy, to simply prove he was without visible means of support. The population was given the option between going to jail as vag-

rants or dividing their resources with the tax-gatherer.

As an authority for the right to augment by construction the acts denounced by a statute and to apply the inhibition to other acts besides those expressly enumerated as constituting the offense penalized, the lower court cites, with much gusto, the decision of the Supreme Court in the Standard Oil cases.

The essential difference in principle between that adjudication and the case at bar is found in the obvious fact that the Sherman Law denounces "monopoly" and "restraint of trade," but does not attempt to define either, or to specify what particular acts shall constitute the offense. The duty to do so was thereby thrown on the courts. In the ordinance here in question the town enumerated the acts which it ordained should constitute vagrancy. That fact not only relieves the court from defining vagrancy, but prohibits it from doing so, and no other acts can be charged as vagrancy besides those so enumerated. That enumeration is exclusive and that definition is binding upon the court.

The lower court's other authorities on this point are no more apposite.

The ordinance will have to be accepted by the courts in the language in which it was enacted. When this is done it becomes evident that the town undertook to denounce acts not only innocent in themselves, but acts which cannot be classed as a nuisance. During the last two years our country

has been swarming with good and virtuous men and women without visible means of support. Dire want has stalked over the country and starvation has hovered about the thresholds of thousands of good homes. Can this court presume that the town of Juneau has been authorized by implication to abate this evil by punishing the unfortunate?

B.

Equal Rights on the Streets.

The ordinance provides that, "all persons having no known occupation or business, who shall be found wandering about the streets of the city of Juneau, after the hour of 11 o'clock at night, shall be deemed vagrants".

There can be no doubt that the town has authority to prescribe reasonable regulations for the use of the streets. Such regulations must be equitable and not arbitrary, and must be fairly designed to meet the needs of relieving congestion and facilitating traffic. If an ordinance had been enacted providing that it should be unlawful to loaf or loiter on the streets in the congested sections of the town during its busiest hours, it would have been a good ordinance, provided the conditions reasonably required such regulations,—and the presumption would be in favor of the reasonableness of such an enactment. But if the ordinance should denounce such loafing and loitering only by a certain class of loafers and

not by all loafers alike, the enactment would be vicious.

The ordinance here in question can not be sustained as a street regulation (1) because it denounces wandering on the street after 11 P. M.—the very hours when the streets are least used and the traffic demands the least regulation; and, (2) because it confines the inhibition to persons having no known occupation or business. It certainly is immaterial to the traffic of the street whether a person wandering thereon has a known occupation or not. Such classification is unjust, unreasonable and uncalled for.

Under this ordinance any person of however good a character, who should choose to wander about the streets at night, unless his occupation or business was known, would be a criminal; but one whose business was known, however reprehensible that business might be, would be a privileged character.

The reasons for the illegality of such ordinance are so clearly stated in the quotations below given that any extended original discussion of the subject is uncalled for:

Mayor vs. Winfield, 8 Humphrey, 707.

Gastineau vs. Commonwealth, 56 S. W., 705

Matter of Frazee, 63 Mich., 396. (6 Am. St. R., 310.)

St. Louis vs. Gloner, 109 S. W., 30.

Taylor vs. City of Sanderville, 44 S. E., 845.

In Gastineau vs. Commonwealth, *supra*, there was

a conviction for a violation of the ordinance which provided, "That it shall be unlawful for any woman to go in and out of any building where a saloon is kept * * * * or to frequent, loaf or stand around said building within fifty feet thereof". Upon appeal the court said:

> "It is contended for appellee that the sole object of the ordinance is to regulate and control the sale of liquors by reason of the fact that very disreputable, low, common and vile women congregate in and about saloons, thereby causing affrays, fights, murder and other crimes. * * * * It is insisted for appellant that, in any event, the ordinance is too sweeping in its nature, and subjected any woman who may chance to be wandering around the street and meet a friend, and stop within fifty feet of a saloon, or go into a hotel where liquor is sold, to arrest and punishment.
>
> "It seems to us that the ordinance in question is unreasonable and an unnecessary interference with individual liberty, and tends to subject the vendor of liquor as well as the citizen to unreasonable prosecutions.
>
> "If the ordinance only included persons mentioned in appellee's brief, we are not prepared to say that it would be invalid. But it might be that very good women would, for proper and legal purposes, find it necessary to go into a building where liquor was sold, or stop for a

> reasonable time within fifty feet of the same * * * *."

It will be observed that the court in the foregoing decision did not consider itself authorized to amend the ordinance by construction so as to make it reasonable and otherwise legal.

Matter of Frazee *supra.*, was a decision by the Supreme Court of Michigan, in which Chief Justice Campbell wrote a clear-cut and lucid opinion, holding the ordinance void upon habeas corpus proceeding after conviction of petitioner in a lower court.

The first section of the ordinance claimed to have been violated provided:

> "No person or persons, association or organization, shall march, parade, ride, or drive in or upon or through the public streets of the city of Grand Rapids, with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the mayor or common council of said city; funeral and military processions, however, shall not be subjected to the foregoing provisions of this section * * * *."

The lower court asserts that this ordinance was held void solely upon the ground that it left the arbitrary power with the mayor to grant permits.

From the quotations which follow it is obvious the court has misread this decision. The Supreme Court *inter alias* said:

"Section 1, as has been seen, while imposing no limits on military and funeral processions, except that it authorizes the mayor or chief of police to confine them to particular streets, gives to those officers unlimited discretion to fix their route. Other processions can not move at all, with music and banners, unless authorized by the mayor or council, and when so authorized, are under the same arbitrary direction, as to route, of the mayor or chief. Funeral processions, and no others, are protected from disturbance.

"If the legislature of the state had the power to subject the people of cities to the uncontrolled and arbitrary will of a common council, and, having such power, had clearly signified their purpose to do so, then it might perhaps be claimed, with some show of reason, that the City of Grand Rapids could do what it pleased under these grants of power. But the rules of legal construction allow no such absurdity. It is not in the power of the legislature to deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers.

"All charters, and all laws and regulations, to be valid for any purpose, must be capable of construction, and must be construed in conformity to constitutional principles, and in harmony with the general laws of the land, and

any by-law which violates any of the recognized principles of legal and equitable rights is necessarily void, so far as it does so, and void entirely if it cannot be reasonably applied *according to its terms.*

"It is quite possible that some things have a greater tendency to produce danger and disorder in the cities, than in smaller towns, or in rural places. This may justify reasonable precautionary measures but nothing further; and no inference can extend beyond the fair scope of powers granted for such a purpose, and no grant of absolute discretion to suppress lawful action altogether can be granted at all. *That which is an actual nuisance can be suppressed just so far as it is noxious, and its noxious character is the test of its wrongfulness.*

"There may be substances, like some explosives, which are dangerous in cities under all circumstances, and made dangerous by city conditions; but most dangerous things are not so different in cities as to require more than increased or qualified safeguards. And to suppress things not absolutely dangerous, as an easy way of getting rid of the trouble of regulating them, is not a process tolerated under free institutions. Regulation, and not prohibition, unless under clear authority of the charter, and in cases where it is not oppressive, is the extent of city power.

"It has been customary, from time immemorial, in all free countries and in most civilized countries, for people who are assembled for common purposes to parade together, by day or at reasonable hours at night, with banners and other paraphernalia, and with music of various kinds. These processions for political, religious, and social demonstrations are resorted to for the express purpose of keeping up unity of feeling and enthusiasm, and frequently to produce some effect on the public mind by the spectacle of union and numbers. They are a natural product and exponent of common aims, and valuable factors in furthering them * * * *. It is only when political, religious, social, or other demonstrations create public disturbances or operate as nuisances, or create or manifestly threaten some tangible public or private mischief, that the law interferes. And when it interferes, it does so because of the evil done or apparently menaced, and not because of the sentiments or purposes of the movement, if not otherwise unlawful; and things absolutely unlawful are not made so by local authority, but by general law * * * *. It is a fundamental condition of all liberty, and necessary to civil society, that all men must exercise their rights in harmony, and must yield to such restrictions as are necessary to produce that result. It is not competent to make any excep-

tions, either for or against the body of which petitioner is a member, because of its theories concerning practical work. In law it has the same right, and subject to the same restrictions, in its public demonstrations, as any secular body or society which uses similar means for drawing attention or creating interest.

"Whatever regulation is made must operate uniformly under the same conditions. It is competent to hold all persons liable for any actual wrong done which creates dangerous or noxious consequences. That is already provided for under the law of nuisances. These processions might, no doubt, become nuisances, as any others might do so, but it can not be assumed that they will."

This decision establishes three propositions of law:

(1) That the city council has no authority to deny any citizen an equal right on the streets, with all other citizens.

(2) Nor to prohibit the use of the streets in any manner that does not in and of itself amount to a nuisance.

(3) Nor to delegate to any official arbitrary power to grant or withhold permit for using public streeets.

In City of St. Louis vs. Cloner, *supra.*, defendant was charged with violating an ordinance declaring it unlawful for "any person or persons to lounge,

stand or loaf around or about or at street corners, or other public places in the day or night time."

The court held this feature of the ordinance void, and in doing so said:

> "While the city of St. Louis is given power by the second clause of Section 26, Art. 3, of its charter (Ann. St. 1906, p. 4809) to regulate the use of its streets, *the question here presented is as to whether it had the right, under the provisions of its charter, to pass the ordinance upon which this prosecution is based,* and which makes it a misdemaenor, punishable by fine, for any person to lounge, stand, or loaf around or about or at street corners or other public places, in the day or night time. There is no pretense that defendant was at the time of his arrest in any way obseructing the street, or interfering with the rights of any other person, or conducting himself in a disorderly manner; the only charge against him being that he violated said ordinance on the 4th day of August, 1904, and on divers other days and times prior thereto, by unlawfully lounging, standing, and loafing around and about and at certain public street corners and other public places, to-wit, Eleventh street and Washington avenue, in the day and night time. While the city has the undoubted right, under its charter, to regulate the use of its streets, it has no right to do so in a way that interferes with the personal liberty of a citizen

as guaranteed to him by our constitution and laws. Under this ordinance it is just as much an offense to stand or loaf around upon the corner of one of the streets in the city for five minutes as for two hours or more, time not being an ingredient of the offense; and this, too, regardless of the fact that the offender may not during that time impede the passage of other pedestrians or otherwise interfere with the rights of others. The defendant had the unquestioned right to go where he pleased, and to stop and remain upon the corner of any street that he might desire, so long as he conducted himself in a decent and orderly manner, disturbing no one, nor interfering with any one's right to the use of the street.

"Is the ordinance in question, then, restrictive of or in violation of the right of personal liberty guaranteed to every citizen by Section 4, Article 2, of the Constitution (Ann. St. 1906 p. 128) of this state?

"In City of St. Louis v. Roche, 128 Mo. 541, 31 S. W. 915, a city ordinance making it an offense for anyone to knowingly associate with persons having the reputation of being thieves, gamblers, etc., for the purpose of aiding and abetting such persons in their unlawful acts, was held invalid, because an invasion of personal liberty. That case was followed in ex

parte Smith, 135 Mo., 223, 36 S. W., 628, 33 L. R. A., 606, 58 Am. St. Rep., 576.

"In the case of Pinkerton v. Verberg, 78 Mich., 573, 44 N. W., 579, 7 L. R. A., 507, 18 Am. St. Rep., 473, it is said:

" 'Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the right of locomotion, to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all citizens. One may travel along the public highways or in public places; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens there, they will be protected under the law, not only in their persons, but in their safe conduct. The Constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. These are rights which exist-

ed long before our Constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land.' "

It is evident, the opinion of the lower court to the contrary notwithstanding, that this case was decided upon the question of the validity of that portion of the ordinance above quoted, and that, if the case had been before the court solely upon a judgment in *habeas corpus* proceedings under that feature of the ordinance, a reversal would have resulted upon the theory that the ordinance was void upon its face.

Taylor vs. City of Sanderville, *supra.*, has been relied upon by the appellee, but, it is believed, without reason. That case was decided on a writ of *certiorari.* The petition and answer showed that petitioner was convicted of violating a municipal ordinance making it penal "to be found idling, loitering or loafing on the street".

There is nothing in the records of the case to show that the ordinance in the lower court was attacked as unreasonable, oppressive, and unconstitutional. The court upheld the ordinance as a valid street regulation, because it applied to all classes of citizens alike and therefore was not in conflict with the vagrancy statute of the State. It said:

"The ordinance is not aimed at the lazy and shiftless, who are apt to require support in some public institution, or else to resort to theft; but to all persons, rich or poor, who loiter and loaf

on the public streets * * * * and who, at best, render more difficult the passage of others along the street."

Among ordinances held void as partial, unreasonable, and oppressive, the following may be cited:

Requiring the police to arrest all free negroes found on the street after ten o'clock at night.

Mayor vs. Winfield, 8 Humphrey, 707.

Forbidding sale of goods by store-keepers on Sunday, and exempting Jews from its operations.

Shreveport vs. Levy, 21 Am. R., 553.

Prohibiting one person from carrying on dangerous business, and permitting another to do so.

Mayor vs. Thorne, 7 Paige, 261.

Compelling persons to destroy or remove property not shown to be a nuisance.

Pieri vs. Mayor, 42 Miss., 493.

Prohibiting licensed retailers of spirituous liquors from selling it between 6:00 P. M. and 6:00 A. M.

Ward vs. Greenville, 8 Baxter, 228.

Compelling the removal from the city of a steam engine which is not, in itself, a nuisance.

Baltimore vs. Radecke, 49 Md., 217.

Prohibiting sale, without license, at temporary stands, in the public streets, of lemonade, ice cream, etc.

Burling vs. West, 29 Wis., 307.

Requiring a druggist, under heavy penalty, to furnish quarterly statement, verified by affidavit, of kind and quantity of spirituous liquors sold.

Clinton vs. Phillips, 58 Ill., 102.

Imposing a fee of five cents on every sale of hay or produce.

Keep vs. Patterson, 2 Dutch., 298.

Prohibiting producers from vending vegetables upon the public streets without first procuring license, at an annual expense of $25.00.

St. Paul vs. Traeger, 25 Minn., 248.

Refusing to supply water to premises, upon application of owner, on the ground that the tenant was in arrears for water furnished him while occupying premises of another landlord.

Dayton vs. Quigley, 29 N. J. Eq., 77.

Excluding applicant from entering High School, who had passed a satisfactory examination in every study except grammar, it appearing that the parent did not desire that his child should pursue that study.

Trustee vs. People, 87 Ill., 303.

Expelling a child from school for declining, under direction of her parents, to study book-keeping.

Rulison vs. Post, 79 Ill., 567.

See generally on this subject:

28 Cyc., 368.

V.

FUNDAMENTAL ERRORS OF LOWER COURT.

The lower court, as the foundation stone of its argument, announces this astonishing rule:

"All doubt must be resolved in favor of the validity of the ordinance. The burden is upon the one who asserts its invalidity to demonstrate it."

In answer the following authorities are respectfully submitted:

> "Where a city ordinance is claimed to interfere with common law rights, the burden is upon the city to show that it has not exceeded its powers in passing such an ordinance."
>
> *City of St. Paul vs. Laidler*, 72 Am. Dec., 189.
>
> "If there is a *fair reasonable doubt* concerning the existence of the power in the charter of the city, it will be resolved against the city, and the exercise of the power denied."
>
> (1899) *Thomas vs. City of Grand Junction*, 56 Pac., 665;
>
> (1903) *State vs. Butler*, 77 S. W., 560;
>
> (1901) *Meday vs Borough of Rutherford*, 48 A., 529.
>
> "Municipal corporations possess only such powers as are granted by the legislature in express words, and those necessarily implied or incidental to those expressly granted, and those

necessary to the declared object and purpose of the corporation to its continued existence; and doubtful claims to power, or ambiguity in the legislative grant thereof are to be resolved against the corporation."

(1898) *Los Angeles City Water co., vs. City of Los Angeles,* 88 Fed., 720 (729);

(1905) *City of Elkhart vs. Lipschitz,* 74 N. E., 528;

(1882) *Kirkham vs. Russell,* 76 Va., 956.

"A statute conferring power upon a municipality will be presumed t ohave been framed with reference to the rule that nothing is to be taken by intentment in construing legislative grant of power."

Detroit Citizens Streeet Ry. Co., vs. City of Detroit, 68 N. W., 304; 171 U. S., 48 (54).

"Doubtful claims to power or any doubt or ambiguity in the terms used by the legislature in conferring powers on municipal corporations are to be resolved against the corporation."

(1896) *Pittsburg, etc., Ry. Co. vs. Town of Crown Point,* 45 N. E., 587.

The lower court in further justification of its position dilated with seductive power and eloquence upon the need of such an ordinance as the one here in question for a seaport town like Juneau. The

Court's enthusiasm has carried it off its feet and into regions of aerial fancy.

Judicial notice will be taken of the fact that the census for 1900 shows that the population of Juneau that year was 2000 and that the census for 1910 shows this number to have declined to 1,600 souls. During this period of retrogration (1903) the ordinance in question was enacted.

The court takes judicial notice of the further fact that our only export during those years was a few pounds of gold from Treadwell, credited to this port, while our imports consisted of sufficient to feed this population.

The Customs House records further show that steamers calling at this port, on their route between the southern ports and Skagway, would average only about three per week throughout the year.

Since then there may have been some changes, but if the ordinance was void when enacted no change in conditions subsequently would validate it.

But what are these changes? At last city election, where both men and women, citizens and non-citizens, had a right to vote, the number exercising the elective franchise was only about 1,000. This would show at the present time a population of less than 4,000, based upon the ordinary methods of calculation.

These conditions would not be worthy of notice except for that straining for excuses which we think

characterizes the opinion of the lower court. So much was that learned tribunal distracted by its own enthusiasm that it lost sight of the main questions in the case.

Respectfully submitted,

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